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Counsel for *Defendant Facebook, Inc.*

**UNITED STATES DISTRICT COURT**  
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
**OAKLAND DIVISION**

DAVID A. STEBBINS,

*Plaintiff,*

v.

KARL POLANO ET AL.,

*Defendants.*

Case No. 4:21-cv-04184-JSW

**FACEBOOK, INC.'S MOTION TO  
VACATE ENTRY OF DEFAULT AND  
OPPOSITION TO MOTION FOR ENTRY  
OF DEFAULT JUDGMENT**

Ctrm.: A, 15th floor

Judge: Hon. Magistrate Judge Alex G. Tse

SAC Filed: September 17, 2021

Trial Date: Not Set

1 Defendant Facebook, Inc. (“Facebook”), by and through undersigned counsel, and  
2 pursuant to Rule 55 of the Federal Rules of Civil Procedure, hereby moves to Vacate the Entry of  
3 Default [Dkt. 72] and opposes the Motion for Entry of Default Judgment [Dkt. 74] filed by  
4 Plaintiff David A. Stebbins (“Plaintiff”). In support hereof, Facebook states the following:

5 **I. Default Was Entered Against Facebook in Error**

6 1. On June 2, 2021, Plaintiff apparently filed his Complaint in the instant action  
7 naming defendant Karl Polano as the sole defendant. [Dkt. 01.]

8 2. On July 29, 2021, Plaintiff apparently filed his First Amended Complaint which  
9 named Facebook as a defendant among other defendants. [Dkt. 11.]

10 3. Plaintiff purports to have served Facebook with a copy of the First Amended  
11 Complaint on September 10, 2021. [Dkt. 59.]

12 4. On September 17, 2021, prior to Facebook’s time to respond to the First Amended  
13 Complaint, Plaintiff apparently filed his Second Amended Complaint. [Dkt. 55.]

14 5. On September 22, 2021, the Court issued an order directing service of the Second  
15 Amended Complaint. [Dkt. 60.] Accordingly, Facebook understands that the Second Amended  
16 Complaint is the operative Complaint in this matter.

17 6. To the best of Facebook’s knowledge and understanding, it has not yet been served  
18 with a copy of the Second Amended Complaint. Nonetheless, on October 2, 2021, Plaintiff filed a  
19 Motion for Entry of Default as to Facebook. [Dkt. 70]. Then, on October 4, 2021, the clerk  
20 noticed Facebook’s default as to the First Amended Complaint apparently without recognizing  
21 that: (i) the First Amended Complaint was supplanted by the Second Amended Complaint; and  
22 (ii) there was no Certificate of Service on the docket as to service of the Second Amended  
23 Complaint on Facebook (indeed, as noted, Facebook has no record of being served with the  
24 Second Amended Complaint). Accordingly, notice of default was entered against Facebook  
25 erroneously.

26 7. Facebook recently engaged undersigned counsel to enter an appearance and file  
27 responsive pleadings in this matter.

8. On October 4, 2021, and immediately following the Entry of Default, Plaintiff filed a Motion for Entry of Default Judgment [Dkt. 74].<sup>1</sup>

9. Facebook's counsel contacted Plaintiff on Monday, October 4, 2021 and advised Plaintiff that Facebook is amenable to accepting service of the Second Amended Complaint conditioned on the parties working out a reasonable timetable for Facebook's response. Facebook's counsel proposed that the parties agree to extend Facebook's deadline to respond to the Second Amended Complaint to 15 days after all individual defendants are served (which timeline is the same as Plaintiff worked out with defendant Alphabet Inc.'s counsel [Dkt. 69]).

10. Plaintiff did not consent to Facebook's proposal concerning his Second Amended Complaint necessitating the instant motion and opposition.

## **II. Argument**

### **A. Entry of Default Was the Result of Clerical Error and Should be Vacated**

The operative complaint in this action is the Second Amended Complaint which has yet to be served on Facebook. It is incontrovertible that Plaintiff's Second Amended Complaint supersedes the First Amended Complaint which is properly treated as nonexistent. *See Rhodes v. Robinson*, 621 F.3d 1002, 1005 (9th Cir. 2010) ("As a general rule, when a plaintiff files an amended complaint, '[t]he amended complaint supercedes the original, the latter being treated thereafter as non-existent.'") (alteration in original) (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967)).

Here, the Second Amended Complaint became operative *before* Facebook's deadline for responding to the First Amended Complaint. Accordingly, it was in error to grant Plaintiff's Motion for Entry of Default and enter Facebook's default as to the First Amended Complaint because that complaint was rendered nonexistent by virtue of the Second Amended Complaint. In such circumstances, entry of default was the result of clerical error and should be vacated on that basis alone. *See Stoica v. McDonnell Douglas Helicopter Co.*, No. CV-19-05288-PHX-GMS,

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<sup>1</sup> This Motion and Opposition opposes Plaintiff's Motion for Entry of Default [Dkt. 70] and Motion for Default Judgment [Dkt. 74]. Facebook contends that Plaintiff's Motion for Default Judgment is premature as it was filed before Facebook even had notice of the Entry of Default.

2020 WL 3574603, at \*2 (D. Ariz. July 1, 2020) (vacating entry of default that was improperly entered due to a clerical error).

### **B. Good Cause Exists for Setting Aside the Entry of Default**

Even if the Court finds that default was not entered as a result of clerical error, good cause exists for vacating it pursuant to Rule 55(c) of the Federal Rules of Civil Procedure. To begin, the disposition of motions made under Rule 55(c) is a matter within the discretion of the trial judge. *See Franchise Holding II, LLC v. Huntington Rests. Grp., Inc.*, 375 F.3d 922, 926 (9th Cir. 2004) (reviewing district court's set aside of default for abuse of discretion).

A court considers three factors when examining good cause to vacate entry of default: “(1) whether [the party seeking to set aside the default] engaged in culpable conduct that led to the default; (2) whether [it] had [no] meritorious defense; or (3) whether reopening the default judgment would prejudice the other party.” *United States v. Signed Personal Check No. 730 of Yubran S. Mesle*, 615 F.3d 1085, 1091 (9th Cir. 2010) (alterations in original) (quoting *Franchise Holding II, LLC*, 375 F.3d at 925-26).

Under this disjunctive standard, “a finding that any one of these factors is true is sufficient reason for the district court to refuse to set aside the default.” *Id.*, *see also Brandt v. Am. Bankers Ins. Co.*, 653 F.3d 1108, 1111 (9th Cir. 2011). However, a court may within its discretion grant relief from default even after finding one of the “good cause” factors to be true. *See, e.g., id.* at 1112 (“A district court may exercise its discretion to deny relief to a defaulting defendant based solely upon a finding of defendant's culpability, but need not.”). “The court’s discretion is especially broad where . . . it is entry of default that is being set aside, rather than a default judgment.” *Mendoza v. Wight Vineyard Mgmt.*, 783 F.2d 941, 945 (9th Cir. 1986). The factors are more liberally applied with respect to a request to set aside the entry of default, because “there is no interest in the finality of the judgment with which to contend.” *Mesle*, 615 F.3d at 1091 n.1.

Additionally, the Ninth Circuit has emphasized that resolution of a motion to set aside the entry of default is necessarily informed by the well-established policies favoring resolution of cases on their merits and generally disfavoring default judgments. *See Mesle*, 615 F.3d at 1091 (“Crucially,. . . judgment by default is a drastic step appropriate only in extreme circumstances; a

1 case should, whenever possible, be decided on the merits.”) (citations); *Westchester Fire Ins. Co.*  
2 *v. Mendez*, 585 F.3d 1183, 1189 (9th Cir. 2009) (“As a general rule, default judgments are  
3 disfavored; cases should be decided upon their merits whenever reasonably possible”). Moreover,  
4 the Ninth Circuit’s “rules for determining when a default should be set aside are solicitous towards  
5 movants.” *Mesle*, 615 F.3d at 1089.

6 Here, there is ample good cause to vacate the Entry of Default and deny the Motion for  
7 Default Judgment. As discussed above, the operative complaint in this action is the Second  
8 Amended Complaint which Complaint has yet to be served upon Facebook. Accordingly, default  
9 as to the prior, mooted First Amended Complaint was entered against Facebook in error. In such  
10 circumstances, Facebook cannot be said to have been culpable in the entry of default.

11 Furthermore, Facebook only recently retained counsel to defend it in this matter. In that  
12 regard, recently retained undersigned counsel has only just begun familiarizing itself with the  
13 pending action and issues. Facebook intends to vigorously oppose the allegations and claims  
14 asserted in the Complaint and it fully intends to defend those claims and prosecute its affirmative  
15 claims on the merits including issues concerning the validity of Plaintiff’s copyright registration  
16 and issues concerning fair use under 17 U.S.C. § 107. Accordingly, Facebook does have  
17 meritorious defenses.

18 Finally, Plaintiff has not been prejudiced by any delay in Facebook’s response to the  
19 complaint. Indeed, since Facebook has yet to be served with the Second Amended Complaint  
20 there has in fact been no delay whatsoever. Moreover, Plaintiff has sought leave to file a Third  
21 Amended Complaint, and Plaintiff and Alphabet, Inc. have stipulated that Alphabet’s deadline to  
22 respond to the operative complaint will not be due until after the individual defendants in the case  
23 are served. In the interest of justice and in light of the clear preference for cases to be tried on the  
24 merits, equity weighs in favor of vacating the entry of default, denying Plaintiff’s Motion for  
25 Default and allowing Facebook to defend against Plaintiff’s claims.

26 WHEREFORE, Facebook requests that this Court vacate the Entry of Default [Dkt. 72],  
27 deny the Motion for Default Judgment [Dkt. 74], and extend Facebook’s deadline to respond to  
28 the Second Amended Complaint (or the Third Amended Complaint, should the Court authorize

1 that amendment) until 15 days after all individual defendants are served with the operative  
2 Complaint.

3 DATED: October 6, 2021

Respectfully submitted,

4 KILPATRICK TOWNSEND & STOCKTON LLP

5  
6 By: /s/ Joseph Petersen  
JOSEPH PETERSEN

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8 Counsel for Defendant  
FACEBOOK, INC.  
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